

(1945) 07 CAL CK 0016
In the Calcutta High Court
Case No : Appeal No. 59 of 1943

Muhammad Ishak Chowdhury and others	APPELLANT
Vs	
Karunamoy Choudhury and others	RESPONDENT

Date of Decision : 26-07-1945

Acts Referred:

Citation : (1945) 07 CAL CK 0016

Final Decision : Allowed

Judgement

Sharpe, J.—This appeal is directed against the order of the Subordinate Judge, 2nd Court Sylhet, dismissing the appellants' application for execution. The facts are not disputed and are as follows: On 9th August 1932, a final decree was made in a partition suit in which the appellants and respondents and others were parties. Under the terms of the decree, the parties were to get possession of their respective lots in accordance with the Commissioner's final and supplementary reports, keeping joint Beels, Gopats, Khals and Nalas. There was a further direction in the decree that the cosharers mentioned in list kha of the supplementary report should get the compensation money mentioned therein and that the cosharers mentioned in list ka should pay the compensation money to the extent indicated in that list. The persons of list kha entitled to recover the owelty money included both plaintiffs and defendants of the partition suit. There was an appeal to this Court against the final decree and it was dismissed on 14th January 1936.

2. On 15th January 1937, the plaintiffs, decree-holders, applied for execution of the decree making parties all the defendants, judgment-debtors, including the present respondents, and asked that possession should be given of the lands in accordance with the decree. They also sought to realise the sum of Rs. 2552 odd to which they were entitled according to list kha, from certain specified defendants, judgment-debtors of list ka, but they did not ask for any such relief against the present respondents. That execution case was disposed of on 19th May 1939 after confirmation of possession of the lands delivered to the parties

on 20th April 1939. A farther application for execution of the decree was made by the appellants, decree, holders, on 15th January 1942, that is, within three years from the final disposal of the first execution case and in it they sought to recover from the respondents, judgment. debtors, the amount for which they were made liable in list ka.

3. The respondents appeared and objected to the recovery of this money from them on three grounds : (1) The execution was barred by limitation. (2) The decree had been satisfied. (3) The execution was not maintainable as all the decree-holders had not joined. The learned Subordinate Judge rejected the plea of payment which formed the basis of objection (2) and in answer to objection (3) held that there was a defect but that this defect was curable, and not one on which execution could be refused. His decisions on these points have not been challenged before us. With reference to objection (1), however, the learned lower Court held that the decree in the partition suit was primarily two decrees, a decree for allotment of specific lands and a decree that followed by accounting in which, in his view, all the members of the kha group are joint decree-holders and each member of the ka group is a judgement-debtor separately liable for different amounts of compensation. In his opinion, therefore, since the amounts due by the respondents could not have been realized in the first execution case as no relief was sought against them on that account, this first application for execution could not save limitation in respect of the decree for money payable by the respondents. In coming to this conclusion he relied on Explanation 1 to Art. 182, Sch. I, Limitation Act, and the decision in A. I. R. 1926 ALL. 440=48 ALL 377 *Nandlal Saran v. Dharam Kirti* ("26) 13 A. I. R. 1926 All 440 : 48 All. 377 : 94 I. C. 961. He held therefore that execution of the decree was barred against the present respondents and the correctness of this decision has now been questioned in this appeal.

4. It has been conceded by Dr. Sen Gupta for the appellants that if the decree in the partition suit really comprises two decrees, the decision of the lower Court cannot be successfully challenged. He claims, however, that the decree is a single and indivisible one, and consequently that the previous application for execution, in which execution was sought by delivery of possession against all the judgement-debtors, including the present respondents, will keep alive the decree also for recovery of the compensation money payable by them in accordance with list ka. He relied on the general propositions affirmed by the decision in 26 Cal. 888 *Nepal Chandra v. Amrita Lall* ("99) 26 Cal. 888, and other similar authorities that partial execution in respect of one relief, if permitted by the Court, will save from limitation a subsequent application for another relief, especially when the judgment-debtors are parties to and raise no objection in the earlier application. Mr. Das for the respondents has not challenged the general propositions referred to above but has maintained that the view of the lower Court is correct and that the decree in the partition suit comprises two distinct decrees. He has contended that according to the first part of the second portion of Explanation I of Art. 182, Limitation Act, the earlier application for execution,

in so far as it related to recovery of compensation money from some of the judgment-debtors other than his clients, will not save from the bar of limitation that decree against his clients, since it was a decree "passed severally against more persons than one, distinguishing portions of the subject-matter as payable by each" and since in the earlier application no relief was sought against them in respect of payment of compensation money.

5. In view of the position adopted by the parties, it is necessary to decide whether the view of the learned Subordinate Judge is correct that the decree in the partition suit comprised in fact two decrees. His view proceeded mainly on two considerations, (1) that the decree granted separate reliefs, viz., division of the joint property amongst the cosharers and the award of compensation payable by some of the cosharers to others of the cosharers, and (2) that the combinations of the decree-holders and judgment-debtors in the two decrees were different. Now so far as the first consideration is concerned, we do not think that the granting of separate reliefs is very material or that this would be inconsistent with the view that the decree was a single and indivisible one. The granting of separate reliefs in one decree is by no means uncommon, e.g., for possession, mesne profits and costs and decrees of this nature were considered in 26 Cal. 888 *Nepal Chandra v. Amrita Lall* ("99) 26 Cal. 888 and 14 C.W.N. 465 *Baroda Kinker v. Nabin Chandra* ("10) 4 I. C. 408 : 14 C.W.N. 465 : 11 C.L.J. 83, in which piecemeal execution of decrees was held to save a subsequent application for a different relief from the bar of limitation. Moreover the reliefs granted in the decree now under consideration, though separate, were closely interconnected since they were intended jointly to allot to each cosharer that amount of the joint property proportionate to his share, substituting in respect of certain cosharers an amount of compensation in lieu of additional land.

6. The material consideration, we think, is the second, that the combination of the decree-holders and judgment-debtors entitled to reliefs under the two portions of the decree were different, and along with this there is the further consideration that the reliefs were granted both severally and jointly in favour of and against "more persons than one". It is the latter complication which appears to us to present the greater difficulty, and the importance of this or of the fact that decree under present consideration is one in a suit for partition, do not appear to have been specially considered by the learned lower Court in his appreciation of Explan. I to Art. 182, Limitation Act, and of the decision, A. I. R. 1926 ALL. 440 *Nandlal Saran v. Dharam Kirti* ("26) 13 A. I. R. 1926 All 440 : 48 All. 377 : 94 I. C. 961, on which he has relied. Ordinarily, the decree in a partition suit is one decree and there is nothing in the form of the decree, under consideration to indicate, prima facie, any departure from the ordinary rule. Separate reliefs were of course allowed, but, as we have already indicated, that fact would not by itself transform the decree into two decrees. We must also point out that so far as the plaintiff decree-holders were concerned, they were decree-holders in respect of all the reliefs, and, in the earlier application for execution, they asked for all the reliefs to which they were entitled under the

decree as a whole. The defendants, judgment-debtors, including the present respondents, were parties to that execution case and did not raise any objection, so that the conduct of the parties suggests that at that time they proceeded on the footing that the decree was one decree. Moreover, in a decree in a partition suit, the distinction between the decree-holders and the judgment-debtors in regard to the relief for allotment of land is to a large extent artificial, so far as execution is concerned, and the relief granted to the plaintiffs, decree-holders, and certain of the defendants, judgment-debtors, by award to them of specified sums of money was on account of the joint relief granted to all the cosharers of keeping joint between them all the Beels, Gopats, Khals and Nalas. Whilst" therefore, this relief in the shape of compensation may in one view be considered to be a relief or a decree passed severally against more persons than one within the first part of the second portion of Explan. I to Art. 182, Limitation Act, in another view it is closely related to that part of the decree which granted a joint relief to or against the entire body of cosharers, whether plaintiffs or defendants.

7. At this stage we think it will be convenient to consider the decision in 36 C. W. N. 772 *Mon Mohan v. Madhusudhan Gope* ("32) 19 AIR 1932. Cal 869: 139 I. C. 786: 36 C. W. N. 772 in which the nature and effect of a decree in a partition suit have been considered. By the decree there under consideration, various lands were allotted in severalty to each of the parties, but a Kalikhola and a strip of land to serve as a road, giving access to certain of the allotments, was reserved as ejmali. That decree was passed on 28th March 1927. In February 1928 the plaintiff brought an execution case and after a Commissioner was appointed to give him delivery of possession, the case was dismissed on part satisfaction in July. 1928. Subsequently, on 20th November 1930, an application for execution was filed by some of the defendants, and objection was taken that further execution was barred by limitation, being more than three years after the decree. This objection was disallowed by the lower Court and on appeal to this Court it was contended on behalf of the applicants for execution that the provisions as to the Kalikhola and road were "passed jointly in favour of more persons than one", namely, in favour of all the parties to the suit, and that if any one relief is joint the whole decree is joint even if other reliefs are given separately. Rankin C. J. accepted these contentions, and observed :

The decree before us is certainly one passed jointly in favour of the plaintiff and the present respondents (defendants) so far as the Kalikhola and road are concerned and unless the decree is for the present purpose to be regarded as though there was one decree for joint possession in favour of the respondents and the plaintiff and another and separate decree for separate possession of their allotments by the respondents, I think this appeal must fail.

8. In reaching this conclusion, His Lordship the Chief Justice considered the decision in A. I. R. 1926 ALL. 440 *Nandlal Saran v. Dharam Kirti* ("26) 13 A. I. R. 1926 All 440 : 48 All. 377 : 94 I. C. 961 on which the learned lower Court has relied, and also the decisions in 30 Mad. 268 *Subramanya Chettiar v. Alagappa*

Chettiar ("07) 30 Mad. 268 and 11 C. L. J. 83 Baroda Kinker v. Nabin Chandra ("10) 4 I. C. 408 : 14 C.W.N. 465 : 11 C.L.J. 83. He remarked that "None of these were partition cases." The decision to which we have just referred appears to afford substantial support for the view that a decree is a joint decree within the meaning of Explan. I to Art 182 if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against the defendants separately, so that if in respect of the joint relief an application for execution is made against one of them, it will save limitation in regard to the other defendants even in respect of the reliefs which have been decreed against them separately. With even greater force we think it may be held that if in respect of the joint relief an application for execution is made against all the defendants, as in the present case, it will save limitation against all those defendants in respect of the reliefs which have been decreed against them separately. We think too that the decision quoted above is an authority for the view that a combination of different decree-holders and judgment-debtors, as they were in that case in respect of the joint and separate reliefs, will not transform the decree into two distinct and separate decrees, if the facts taken as a whole justify the conclusion that the decree is one decree. The view taken in 36 C. W. N. 172 Heramba Chandra v. Jyotish Chandra Sinha ("32) 19 A. I. R. 1932 Cal. 579 : 59 Cal. 501 : 139 I. C. 230 : 36 C. W. N. 172 is supported by the decision in 50 M.L.J. 215 Pattannaya v. Pattayya ("26) 13 A. I. R. 1926 Mad. 453 : 92 I. C. 782 : 50 M. L. J. 215. In the case there under consideration the relevant portion of the decree was as follows :

Plaintiffs do recover from defendants 9 and 10 possession of the plaint property with building thereon described below. Plaintiffs do recover from defendant 9 future rental, etc.

9. It was held that the decree was a joint decree and that an application for execution against defendant 9 alone was sufficient to keep the decree alive against defendant 10. It was argued in that case that

as the decree directs defendants 9 and 10 to pay mesne profits severally, it is not a joint decree but a several decree and the application for execution against defendant 9 cannot be treated as an application in a joint decree.

10. It was held, however, that

where a decree directs that A and B shall pay a certain sum to the plaintiff and farther directs that A should pay another sum and that B should pay another sum and that A and B should bear their own costs, the decree is a joint decree. The decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against each defendant separately.

11. Turning now to the decision in A. I. R. 1926 ALL. 440 Nandlal Saran v. Dharam Kirti ("26) 13 A. I. R. 1926 All 440 : 48 All. 377 : 94 I. C. 961 on which the learned lower Court has relied, we find that although it is an authority for the

view taken by that Court the facts of that case are peculiar. The decree under consideration was based on an award made in a suit for partition of a family business. Dharam Kirti Saran obtained a decree for a sum of Rs. 51,000 and he applied for execution of a portion of this amount against the deceased father of one Param Kirti Saran. Param Kirti objected to the execution but his objection was dismissed and costs of Rs. 418-8-10 were awarded against him. He appealed, but his appeal was dismissed and he was made liable for additional costs of Rs. 262. On 30th August 1921, Dharam Kirti applied for execution against Param Kirti in respect of these amounts of costs, and the question before the Court was whether this application to which Nanda Lal was not a party saved limitation against Nanda Lal against whom an application for execution of the original decree was made on 17th November 1924. Now on these facts, this was clearly a case in which there were separate decrees and the decree of which the earlier execution was sought was a decree against Param Kirti alone. It was merely the, fact that the original decree awarded certain properties to Dharam Kirti against all the defendants which led the learned Judges to consider Explan. 1 to Art. 182, Limitation Act, and to differ from the view expressed by the Madras High Court in 30 Mad. 268 Subramanya Chettiar v. Alagappa Chettiar ("07) 30 Mad. 268, which was approved in 50 M. L. J. 215 Pattannaya v. Pattayya ("26) 13 A. I. R. 1926 Mad. 453 : 92 I. C. 782 : 50 M. L. J. 215, mentioned above. It was also found in A. I. R. 1926 ALL. 440 Nandlal Saran v. Dharam Kirti ("26) 13 A. I. R. 1926 All 440 : 48 All. 377 : 94 I. C. 961 that the execution of the decree was barred for two other reasons, and whilst that decision so far as it relates to the correct application of Explan. I to Art. 182, Limitation Act, cannot be considered to be an obiter dictum, the facts on which it was based were not, we think, such as to supply a reliable interpretation of the correct application to facts of the nature now under consideration, and to which we feel the decisions, in 36 C. W. N. 772 Mon Mohan v. Madhusudhan Gope ("32) 19 AIR 1932. Cal 869: 139 I. C. 786: 36 C. W. N. 772 and 50 M. L. J. 215 Pattannaya v. Pattayya ("26) 13 A. I. R. 1926 Mad. 453 : 92 I. C. 782 : 50 M. L. J. 215 can more appropriately be applied.

12. We do not think it possible to lay down, any hard and fast rules for deciding whether a particular composite decree is one decree or comprises separate decrees. Having regard, however, to all the facts of this case, the nature of the decree under consideration and the decisions in 36 C. W. N. 772 Mon Mohan v. Madhusudhan Gope ("32) 19 AIR 1932. Cal 869: 139 I. C. 786: 36 C. W. N. 772 and 50 M. L. J. 215 Pattannaya v. Pattayya ("26) 13 A. I. R. 1926 Mad. 453 : 92 I. C. 782 : 50 M. L. J. 215, we think that the decree of which execution has been sought against the respondents is one decree. We agree respectfully with those decisions and are of opinion that the decree is a decree "passed jointly against more persons than one" within the meaning of the latter part of the second portion of Explan. 1 to Art. 182, Limitation Act. In this view of the matter, we think that the earlier application for execution against all the cosharers by delivery of possession of the lands which were allotted severally, and of the land

which was kept joint, is sufficient to save from the bar of limitation the relief for award to the appellants decree-holders, of compensation money payable by the respondents judgment-debtors. The appeal is therefore allowed. The order of the learned lower Court allowing Misc. case No. 52 of 1942 is set aside. The execution case will be restored and disposed of according to law. We make no order as to costs.

B. K. Mukherjea, J.

13. I agree.